

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE)	OTA NO. 220510435
APPEAL OF:)	
)	
RVS 4 LESS,)	
)	
Appellant.)	
_____)	

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

FRESNO, CALIFORNIA

WEDNESDAY, OCTOBER 18, 2023

Reported by:

Cynthia P. Hernandez
CSR No. 13521

Job No.:
44696 OTA(B)

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taken at 855 M Street, Suite 960, Fresno,
California, commencing at 1:00 p.m.
on Wednesday, October 18, 2023, reported
by Cynthia Hernandez, CSR No. 13521, a
Certified Shorthand Reporter in and for
the State of California.

1 APPEARANCES:

2
3 Panel Lead: MICHAEL GEARY

4
5 Panel: JOSHUA ALDRICH
6 TERESA STANLEY

7
8 For the Appellant: JOSEPH DOERR, Attorney

9
10 For the Respondent: DEPARTMENT OF TAX
11 AND FEE ADMINISTRATION
12 AMANDA JACOBS, Attorney
13 CHAD BACCHUS, Attorney
14 JASON PARKER, Hearing
15 Representative

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-5 were received in evidence at page 9)

(Respondent's Exhibits A-C were received in evidence at page 9)

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1 FRESNO, CALIFORNIA; WEDNESDAY, OCTOBER 18, 2023

2 1:00 P.M.

3
4 JUDGE GEARY: Welcome to the Office of Tax Appeals.
5 We're here for the hearing in the appeal of RVs 4 Less,
6 Inc., which is Office of Tax Appeals case number
7 220510435. Today is October 18, 2023, and the time is
8 1:01 p.m.

9 Let's begin with the parties identifying
10 themselves by please stating their names and who they
11 represent. Let's begin with the appellants.

12 MR. DOERR: Joseph Doerr for appellant, RVs 4 Less,
13 Inc.

14 JUDGE GEARY: Mr. Doerr, can I ask you is your mic on?

15 MR. DOERR: Oh, sorry.

16 JUDGE GEARY: Press the button and then pull it much
17 closer to you.

18 MR. DOERR: I talk kind of loud, so I figured --

19 JUDGE GEARY: Well, you'd be surprised. You can see
20 how close I am and I haven't had anybody let me know
21 that I'm talking too loud, so keep it nice and close.
22 Thank you.

23 And there's somebody at the table with you. Are
24 you going to --

25 MR. SMITH: Yes. My name is Douglas Smith, CPA. I am

1 a representative of the appellant, RVs 4 Less.

2 JUDGE GEARY: And let me ask you, Mr. Smith, will you
3 be providing testimony today?

4 MR. SMITH: That is correct.

5 JUDGE GEARY: Will you also be providing argument
6 today?

7 MR. SMITH: No.

8 JUDGE GEARY: Just testimony?

9 MR. SMITH: That is correct.

10 JUDGE GEARY: Thank you. You'll need to share your
11 microphone when you are testifying.

12 MR. DOERR: And we'll have our other witness step up.

13 JUDGE GEARY: I understand that. We'll talk about
14 that in a sec.

15 And the respondent, please identify the
16 representatives.

17 MS. JACOBS: Amanda Jacobs, attorney for the
18 California Department of Tax and Fee Administration.

19 MR. BACCHUS: Chad Bacchus, attorney also for the
20 department.

21 MR. PARKER: Jason Parker, Chief of Headquarters
22 Operations Bureau.

23 JUDGE GEARY: Thank you. Welcome, everybody.

24 It's been agreed by the parties that the sole
25 issue to be decided by the panel is whether respondent

1 correctly imposed the negligence penalty. Is that
2 correct?

3 MR. DOERR: Correct.

4 JUDGE GEARY: Respondent, correct?

5 MS. JACOBS: Correct.

6 JUDGE GEARY: Thank you.

7 It's my understanding that appellants will be
8 calling two witnesses to testify today: Daniel Saenz,
9 who was at the time, I believe, office staff during the
10 period in question. And then Mr. Smith, who is
11 appellant's accountant.

12 Is that correct, appellant?

13 MR. DOERR: Correct.

14 JUDGE GEARY: Thank you.

15 Appellant at one time estimated the time required
16 for the presentation of testimony at 40 minutes, but
17 there were three witnesses anticipated at that time.

18 How much time are you currently estimating for
19 your two witnesses?

20 MR. DOERR: 20 minutes. Maybe less. I mean, it's
21 hard to say.

22 JUDGE GEARY: That's all right. I am less concerned
23 about overestimates than underestimates.

24 And will respondent be calling any witnesses?

25 MS. JACOBS: No.

1 JUDGE GEARY: The exhibits have been marked for
2 identification in this appeal. They consist of
3 appellant's exhibits that have been marked 1 through 5
4 for identification. And respondent's exhibits that have
5 been marked A through C for identification.

6 The parties provided copies of these exhibits to
7 each other and to OTA. And OTA incorporated all
8 proposed exhibits into an electronic binder, which
9 should be in the possession of the parties or the
10 representatives and also of the panel.

11 Has appellant confirmed that appellant's exhibits
12 incorporated into the binder are complete and as legible
13 as the ones that appellant's submitted?

14 MR. DOERR: Just checking legibility of that
15 Exhibit 5, but I think they look pretty much the same.

16 JUDGE GEARY: So you have a hard copy of it?

17 MR. DOERR: I have a hard copy of it, yes.

18 JUDGE GEARY: If you wish to display for the panel the
19 best copy of that exhibit you have during the
20 proceedings, you can do that, if you think that would be
21 helpful. We'll get to that point. At whatever point
22 you choose to refer to it, you have the option of doing
23 that.

24 MR. DOERR: I think this one is better.

25 JUDGE GEARY: I actually thought the one originally

1 submitted was better than the second one.

2 MR. DOERR: I have the original one here, so I'll
3 bring it up for you.

4 JUDGE GEARY: We actually have that. That's what they
5 put in the binder.

6 Has respondent also reviewed the exhibits in the
7 binder and confirmed that they are complete and as
8 legible as the one that respondent submitted?

9 MS. JACOBS: Correct, yes. We have. Sorry.

10 JUDGE GEARY: Thank you.

11 Does respondent have any objection to the
12 admission of Appellant's Exhibits 1 through 5?

13 MS. JACOBS: No.

14 JUDGE GEARY: And does appellant have any objection to
15 the admission of Respondent's Exhibits A through C?

16 MR. DOERR: No.

17 JUDGE GEARY: All of those exhibits, Appellant's 1
18 through 5 and Respondent's A through C, are admitted.

19 (Appellant's Exhibits 1-5 and Respondent's
20 Exhibits A-C were admitted.)

21 JUDGE GEARY: Just a little bit about logistics: We
22 discussed this in our prehearing conference, although
23 the times have been adjusted slightly down because we
24 have fewer witnesses. But the way we will proceed is I
25 will administer an oath or affirmation to both your

1 witnesses at the outset.

2 You will have, if you choose it, about
3 five minutes to give a very brief opening statement if
4 you want it. No argument. Just to give us an outline
5 of what the witnesses' testimony will be. Since the
6 witnesses are going to testify immediately thereafter
7 and since you don't expect to take very long, you may
8 want to waive that five minutes. It's up to you.

9 We will follow that with your direct examination
10 of your witnesses; one after the other. Whatever order
11 you choose. After your direct examination, I will offer
12 respondent an opportunity to ask questions and my fellow
13 co-panelists will be offered an opportunity to ask
14 questions.

15 When the questioning of that witness is completed,
16 we'll move to your second witness. Same process for
17 that witness. And when that witness is done, you will
18 have your opportunity to give your main argument.

19 And I believe we are estimating about 15 minutes
20 for your main argument?

21 MR. DOERR: Maybe closer to five.

22 JUDGE GEARY: I like that. Thank you. All right.
23 Good.

24 MR. DOERR: Keep it simple.

25 JUDGE GEARY: That's right.

1 And then, after you give your main argument,
2 respondent will give its only argument, which it was at
3 one time estimated about 15 minutes.

4 Is that still fairly accurate?

5 MS. JACOBS: That's correct.

6 JUDGE GEARY: And when respondent is done, we may have
7 questions of a legal nature for respondent's
8 representatives, just like we could also ask you
9 questions of a legal nature; not factual. And when --
10 whatever questioning that occurs -- and it doesn't
11 happen all the time -- we'll turn to you and you can
12 give your concluding remarks. And you can have about
13 five minutes, if you want it at that point. And that
14 will conclude the hearing.

15 Assuming that there's no surprises during the
16 hearing, that the parties are satisfied with the
17 evidence that came in in writing and the testimony, we
18 will -- OTA will close the record and that will conclude
19 today's proceedings.

20 Any questions from appellant?

21 MR. DOERR: Just to clarify, we're going -- we're
22 doing witnesses first? We don't do an opening?

23 JUDGE GEARY: You can do an opening. You can take
24 five minutes. Respondent is not offering -- I'm an old
25 litigator. Both the old and the litigator being

1 accurate. And, typically, if a party calls a witness, I
2 allow them to give a very brief opening to -- just to
3 summarize what they expect the testimony will be.

4 But don't forget we're not having 15 witnesses.
5 You are going to have your witnesses right after your
6 opening. You can waive it. I don't think we on the
7 panel need it, but if you want to give it, you are free
8 to do that.

9 MR. DOERR: Okay.

10 JUDGE GEARY: All right. Any questions, respondent?

11 MS. JACOBS: No questions. Thank you.

12 JUDGE GEARY: Okay. Thank you.

13 Then let's begin with the administration of the
14 oath to your witnesses. And Mr. Smith is at the table
15 and your witness is right behind him, I'm assuming. Is
16 that correct?

17 Would you both -- you don't have to stand up.
18 Would you both raise your right hand, though? And do
19 you solemnly swear or affirm that the testimony you are
20 going to give in this matter will be the truth, the
21 whole truth and nothing but the truth?

22 First you, Mr. Smith.

23 MR. SMITH: Yes.

24 JUDGE GEARY: And?

25 MS. KUEHNE-SULLINS: Yes.

1 JUDGE GEARY: Thank you.

2 And your name? Would you state your name, too?

3 MS. KUEHNE-SULLINS: Yes. It's Danielle
4 Kuehne-Sullins.

5 JUDGE GEARY: Thank you.

6 All right. It is now 1:08. And, Mr. Doerr, you
7 can begin -- do you want to give an opening?

8 MR. DOERR: Just briefly, that our first witness,
9 Mr. Douglas Smith, will be testifying as to the
10 complexity of the appellant's state -- sorry, sales tax
11 returns.

12 JUDGE GEARY: Okay. And that's all you need for an
13 opening.

14 And will you question him first?

15 MR. DOERR: Yes, I will.

16 JUDGE GEARY: You may begin when you are ready.

17 Remember that -- would you -- is it possible for
18 you to sit next to each other? I think it will
19 facilitate the use of the microphone.
20

21 DIRECT EXAMINATION

22 BY MR. DOERR:

23 Q. Mr. Smith, how long have you worked for the
24 appellant?

25 A. About 12 to 15 years. Something like that.

1 Q. What services do you normally provide for the
2 appellant?

3 A. Usually tax return preparation, planning, and
4 sometimes sales tax-related issues.

5 Q. Can you give a description of the taxpayer sales
6 tax issues and the obligations for the returns that they
7 are to file?

8 A. Yes. They are very difficult. The -- anybody who
9 gets involved with auto sales or RV sales -- it's really
10 kind of a highly-specialized area; similar to
11 construction accounting. It's not your normal every day
12 debits and credits. Usually it takes several years to
13 become good at it.

14 Some of the complexities include you have to
15 determine taxability of smog fees. You have state,
16 local taxes and different taxes depending where the
17 person lives, what their tax jurisdiction is. You have
18 state taxes. You have local issues that you have to
19 determine whether the sale is taxable or not. That
20 could be included in a foreign sale. You have
21 out-of-state sales. You have wholesale sales. You have
22 --

23 JUDGE GEARY: Mr. Smith, slow it down a little bit,
24 please.

25 THE WITNESS: Okay. And you have to account for

1 inventories. Inventories are a big deal, whether
2 they're -- inventories are consignment or regular
3 purchases.

4 You also get into issues for -- sales tax issues
5 according to labor versus part sales. Was the majority
6 or was it a sale to -- was it an issue that was mainly
7 labor? Which would be more non-taxable. Or would it
8 include parts? Whether you're manufacturing something
9 or selling a part.

10 Furthermore, you get into bad debt sales, bad debt
11 transactions, where you have to adjust your tax returns
12 for bad debts.

13 You also get into the general accounting rules.
14 You have to have reconcile bank accounts. Usually, an
15 entity this size, you have several bank accounts with a
16 lot of activity going through.

17 You do the math. You have \$10 million in sales.
18 You do, say, \$35,000 per unit. You're looking at 2- to
19 300 units per year, which is significant.

20 JUDGE STANLEY: Mr. Smith, you are still talking very
21 fast.

22 THE WITNESS: I'm so sorry. I'm so sorry.

23 JUDGE STANLEY: I think if you're reading something,
24 you might need to especially slow down.

25 THE WITNESS: I'm not really reading. I'm just --

1 JUDGE STANLEY: Just looking down at your notes?

2 THE WITNESS: I'm used to -- I go on vacation after
3 this.

4 MR. DOERR: The tax deadline was just on the 16th.

5 THE WITNESS: October 16th was the worst tax day we've
6 had in many years.

7 JUDGE GEARY: Actually, hadn't it been extended again?

8 (Unintelligible, simultaneous speaking.)

9 THE WITNESS: So you also get into foreign
10 transactions, which are usually difficult. You have to
11 keep track of foreign -- items that are financed, when
12 they're sold. Foreign companies generally want to be
13 paid immediately.

14 You get into other allocations of carrying
15 charges, things like -- in other words, it can be a very
16 difficult and time-consuming bit of transactions. It
17 carries a lot of responsibility, because, even though 2-
18 to 300 units doesn't sound like a huge number, it really
19 is a large number, dealing with a lot of dollars. Any
20 time you have a lot of dollars, it carries a lot of
21 responsibility. So it's a very difficult area.

22 There's a comparison that the State Board usually
23 does to DMV records. Well, the DMV records aren't
24 always accurate. They don't always include wholesale
25 sales, out-of-state sales or sales of truck and campers

1 that aren't DMV-registered. So you have to reconcile
2 with the DMV records and whenever you're audited. And
3 so there's a significant amount of work that needs to be
4 done.

5 In short, the auto dealers -- auto or RV
6 dealership business, vehicular transactions can be
7 difficult. It's a specialized field. Many times you
8 see people will stay in that field and become experts in
9 it. And that's all -- the further they go. Same as
10 construction. Same thing. It's a mirror example.
11 People get very good at it. It's hard to find good
12 people, as attorneys or accountants. In the past we've
13 had difficulty finding good people. So what it is, it's
14 a difficult area. It takes many several years to become
15 good at it. And it's difficult to find people that are
16 qualified.

17 BY MR. DOERR:

18 Q. Mr. Smith, you mentioned out-of-state sales and
19 foreign sales. Was that part of the total deficiency?
20 Did they stem from those out-of-state sales or foreign
21 sales?

22 A. Some -- we have some transactions. I think we had
23 two -- one or two foreign sales. I think they had to
24 ship them by ship. And the other, I think, we had
25 several out-of-state sales that, again, had to be

1 reconciled. When you go through those jackets you have
2 to look at delivery records, make sure they're delivered
3 out of state by a person representing RVs 4 Less. The
4 owner didn't take it. There are certain specific
5 requirements that you have to go through in order to
6 determine whether that item is taxable or not. It takes
7 a significant amount of time and you have to have a
8 significant amount of expertise in order to recognize
9 the correct documents.

10 Q. I'm going to turn you to our Exhibit 1.

11 If you take a look at Exhibit 1, Mr. Smith, would
12 you say that the majority, if not only an insignificant
13 part of the liability was prior to the third -- prior to
14 the fourth quarter of 2017?

15 A. No. It looks like it was almost zero. It pretty
16 much zeroed out prior to the fourth quarter of '17. It
17 looks like it was pretty much a push. The liabilities
18 weren't incurred until, it looks like fourth quarter of
19 2017.

20 Q. Can you explain the auditor's adjustment for
21 timing differences in Column L for those quarters that
22 were prior to the fourth quarter of 2017?

23 A. Yes. Usually the auditors look at DMV records.
24 And sometimes those DMV records don't reflect exactly
25 the sale date occurred on the client's records.

1 Sometimes it will be before. Usually it happens near a
2 cutoff period, like year-end. And you'll sometimes be
3 reconciling differences, where it shows that it was a
4 sale for DMV, but, in fact, it was some other -- it was
5 some other -- like a month or two before or something to
6 that effect.

7 (Reporter clarification.)

8 THE WITNESS: I'm so sorry.

9 The -- usually it creates a reconciliation
10 difference when you have a sale, for instance, on the
11 books. A lot of times it will happen before. For
12 whatever reason, there is a delay in getting a report
13 sale to the DMV. And so it may go into the subsequent
14 year.

15 BY MR. DOERR:

16 Q. So would it be fair to say that prior to the
17 fourth quarter of 2017, the adjustments that the auditor
18 made mostly had to do with timing differences and did
19 not result into any of the deficiency that we see?

20 A. That is correct, yes.

21 Q. One more question, Mr. Smith: Why did we have
22 limited -- why did the appellant have limited records,
23 as contented by the department?

24 A. I'm not quite sure. Unless the -- it looks like
25 they are pretty good records prior to '17, just based on

1 the adjustments. After '17 it looks like there were
2 significant deficiencies. I would say it probably had
3 to do with the quality of the person doing the work.
4 I'm not sure the -- like I say, the quality of the
5 person doing the work is what matters. Accountants, we
6 learn over time to make sure you document what it is
7 that you are producing.

8 Q. Just following up on that, do you know what an
9 SUTR worksheet is?

10 A. SUTR? State -- I'm not sure. State -- I --
11 probably know what it is exactly. "State" something.
12 I'm not sure.

13 MR. DOERR: Okay. We're finished here.

14 JUDGE GEARY: Thank you.

15 Does Respondent have any questions for this
16 witness?

17 MS. JACOBS: We do have a question or two.

18 JUDGE GEARY: Proceed.

19
20 CROSS-EXAMINATION

21 BY MS. JACOBS:

22 Q. Mr. Smith, what was your role during the liability
23 period for appellant?

24 A. Actually, back in '17, I'm not sure. We worked
25 for RVs 4 Less like 10, 12 or 15 years ago. And then we

1 ceased working with them for a period of time and then
2 we went back to work for them again. And I'm not sure I
3 had a role in that '17 -- '16 to '17 period. Although
4 they did talk to me after the fact, like, in --
5 thereafter. And they consulted with me thereafter.

6 Q. Okay. The liability period extended 2016 to 2018?

7 A. That's right.

8 Q. And you didn't have a role in 2018?

9 A. I'm not sure. I'd have to go back and check our
10 tax returns. But I'm not sure that we were involved in
11 that period. I think we -- the first return we
12 prepared, I want to say was that '18-19 period.

13 Q. Thank you.

14 A. When I say "first return," I mean the first return
15 after we had worked for them before. So there was a
16 lapse.

17 MR. BACCHUS: And just to follow up on that question
18 and answer, so when you speak of "we," you are speaking
19 of your company. You weren't an employee of Appellant?

20 THE WITNESS: No. We were not an employee. We were a
21 CPA firm, that's correct.

22 MR. BACCHUS: Thank you.

23 JUDGE GEARY: That's it for Respondent? Let me ask my
24 fellow panel members if they have any questions.

25 Judge Stanley, do you have any questions?

1 JUDGE STANLEY: Not at this time. Thank you.

2 JUDGE GEARY: Judge Aldrich?

3 JUDGE ALDRICH: Not at this time. Thank you.

4 JUDGE GEARY: I do have a question or two.

5 Mr. Smith, early in your testimony you said you
6 worked with them 12 to 15 years. I'm assuming that does
7 not include the break in the representation, correct?

8 THE WITNESS: That is correct. I worked for them
9 initially for a few years. And then they went someplace
10 else and then they came back.

11 JUDGE GEARY: All right. Can you tell me -- can you
12 give me any reasonable estimate of when you came back to
13 handle their accounting work?

14 THE WITNESS: I think it was about that '18 period. I
15 think the first return we did was about '18, I believe.

16 JUDGE GEARY: And when you say "the first return," are
17 you referring to a sales and use tax return?

18 THE WITNESS: No. It was income tax.

19 JUDGE GEARY: Which is principally what you did for
20 them?

21 THE WITNESS: Right.

22 JUDGE GEARY: Did you ever do a sales and use tax
23 return and sign a sales and use tax return for this --

24 THE WITNESS: We didn't sign it, but I believe our
25 firm did do -- during the interim period, I believe we

1 had a couple sales tax returns.

2 JUDGE GEARY: Do you know whether you did any sales
3 tax returns during the period at issue here, which is
4 2016 through 2018?

5 THE WITNESS: I do not believe so, no.

6 JUDGE GEARY: During -- at the time at issue here, do
7 you know whether or not appellant used any type of
8 accounting management system?

9 THE WITNESS: They used QuickBooks, which you can --
10 QuickBooks isn't necessarily as good as what some --
11 like what retail sales programs are; however, you can --
12 QuickBooks is very flexible. It's like an accounting
13 Excel spreadsheet. It can be modified to do
14 sales-related issues. You can make QuickBooks
15 accomplish what you are trying to make it do.

16 JUDGE GEARY: So you know that they used QuickBooks?

17 THE WITNESS: That is correct.

18 JUDGE GEARY: To your knowledge, they did not use any
19 form of specialized accounting system that's
20 specifically for automobile and vehicle dealers?

21 THE WITNESS: Daniel would be better able to answer
22 that. They might have done it, I think, for sales,
23 maybe for tracking. I believe they did for sales, to
24 keep track of inventory. But I'm not familiar with
25 that. I couldn't tell you.

1 JUDGE GEARY: Okay. Thank you. Those are the only
2 questions I had, Mr. Smith.

3 Let me open it up one more time. Did you have any
4 follow-up questions?

5 MR. DOERR: No.

6 JUDGE GEARY: Does respondent have any follow-up
7 questions?

8 MS. JACOBS: No. Thank you.

9 JUDGE GEARY: Judge Aldrich, any follow-up questions?

10 JUDGE ALDRICH: No. Thank you.

11 JUDGE GEARY: Judge Stanley?

12 JUDGE STANLEY: No, I don't.

13 JUDGE GEARY: Thank you. Then we are finished with
14 Mr. Smith.

15 Mr. Smith, you can stay there, I suppose, and we
16 can invite the next witness up to sit next to Mr. Doerr,
17 if you want.

18 What's your preference, sir?

19 MR. DOERR: She can fit there.

20 JUDGE GEARY: When you begin your examination, just
21 ask the witness to identify herself and state what her
22 relationship or connection with the taxpayer is.

23 MR. DOERR: That's my first question.

24 JUDGE GEARY: Thank you.

25 ///

1 DIRECT EXAMINATION

2 BY MR. DOERR:

3 Q. So can you please state your name?

4 A. Danielle Kuehne-Sullins.

5 Q. What's your position at RVs 4 Less during the
6 period -- the tax period we're dealing with, which is
7 '16, '17, '18?

8 A. I did the sales.

9 Q. Anything else?

10 A. Help with the office stuff.

11 Q. Can you describe your relationship with Dan
12 Kuehne?

13 A. That's my father.

14 Q. To your knowledge, is Dan Kuehne the sole owner of
15 RVs 4 Less?

16 A. He is hundred percent owner.

17 Q. Who makes hiring and firing decisions at RVs 4 --
18 I'm sorry, appellant?

19 A. We both do. We both hire and discuss and
20 terminate. We both do.

21 Q. Is it fair to say that you and Dan run the
22 business?

23 A. We do.

24 Q. Did you have any specialized experience or
25 knowledge during the period for preparing sales tax

1 returns?

2 A. Not at all.

3 Q. How did you handle the preparation of sales tax
4 returns?

5 A. Well, we hired people to take care of that for us.
6 The bookkeeper, accounting people in our office.

7 Q. Do you recall the tax period of 2012 to 2014 when
8 you had a sales tax audit and you were -- there was a
9 deficiency?

10 A. Yes.

11 Q. What did you do after that period?

12 A. We hired -- at that time we didn't have anybody
13 that was trained. And then we hired people that were
14 experienced in QuickBooks and bookkeeping and sales tax
15 preparation.

16 Q. Based on what Mr. Smith said, looking at
17 Exhibit 1, the most -- the deficiency started in the
18 fourth quarter of 2017. Prior to that, who handled the
19 sales tax forms?

20 A. In 2016?

21 Q. In 2016.

22 A. A gentleman named Daren was in there.

23 Q. Did you have any issues with sales tax during that
24 period?

25 A. No.

1 Q. What happened with this gentleman?

2 A. He went into his own practice of accounting.

3 Q. And who did you hire to replace him?

4 A. Anna Perez.

5 Q. Why did you hire Anna for that position -- or
6 Ms. Perez?

7 A. That was her skill set. She was experienced in
8 accounting.

9 Q. Are you familiar with Exhibit 2?

10 A. Yes.

11 Q. On the basis of Exhibit 2, which includes an email
12 and also a resume, did you feel that she was competent
13 to handle sales tax returns?

14 A. Yes, absolutely.

15 Q. Did Dan Kuehne have any say in her hiring?

16 A. Yeah. He agreed that her resume showed that she
17 was skilled to have that position, yes.

18 Q. How did Ms. Perez work out for you?

19 A. She ended up having some mental issues. She ended
20 up not working out. But, yeah, she had a lot of
21 personal issues.

22 Q. I'm referring to Exhibit C, where she's
23 basically -- can you go to -- sorry, Exhibit 3.

24 What was she requesting in this email?

25 A. She was requesting to work from home. She was

1 requesting to work from home seven days a week is what
2 the email says.

3 Q. Did she also state that she hadn't been performing
4 her job duties lately?

5 A. She was apologizing, yes. Apologizing for her
6 work.

7 Q. Ultimately what happened with Ms. Perez?

8 A. She ended up leaving.

9 Q. And once Ms. Perez left -- do you remember what
10 quarter that was?

11 A. I don't have the exact quarter that she had left.
12 That looks like it was 2018.

13 Q. Well, let me -- okay.

14 After Ms. Perez, what did -- who did you hire
15 after that?

16 A. John Cochran.

17 Q. And why did you hire Mr. Cochran?

18 A. He had, like, well -- extremely -- knowledge in
19 this department and QuickBooks and bookkeeping and sales
20 tax, but he was, like, supposedly -- he represented
21 himself as the best person we could ever have in that
22 department.

23 Q. Did Dan Kuehne also interview Mr. Cochran?

24 A. He did, yes.

25 Q. And the two of you decided to hire him to replace

1 Ms. Perez and perform your sales tax?

2 A. Yes.

3 Q. What ultimately happened with Mr. Cochran?

4 A. The U.S. Marshals came in and arrested him at our
5 job site.

6 Q. Do you know why they arrested him?

7 A. Fraudulent claims.

8 Q. Did you -- were you aware during Mr. Cochran's
9 employ that there was any sales tax issues that were
10 outstanding?

11 A. No. I wasn't aware of any issues.

12 Q. If you look at Exhibit 5, it looks like it's a
13 write-up by you. Can you explain this document?

14 A. Yes. So our bank account was levied and that's
15 how we came to find out that he wasn't being truthful on
16 the tax return. Our bank account was levied, and so we
17 wrote him up for that.

18 Q. Could you read that date for us?

19 A. 10/29/19.

20 Q. So that would be after the period of -- that we're
21 dealing with here?

22 A. Right.

23 Q. So during that relevant period you were unaware of
24 any sales tax issues?

25 A. Correct.

1 Q. Did you claim -- did you file a police report
2 against Mr. Cochran?

3 A. We did file a police report, because we ended up
4 having theft. And employees ended up having their bank
5 accounts hacked. We had check fraud. We had numerous
6 issues; our bank account being logged into by other
7 people.

8 Q. So beyond the sales tax reporting that was not
9 done correctly or timely, there was also a lot of other
10 problems with Mr. Cochran?

11 A. Payroll tax, sales tax, check fraud, Social
12 Security numbers of employees, bank accounts of
13 employees.

14 Q. On Exhibit 4, it looks like it's an insurance
15 claim form. Do you know why you didn't pursue an
16 insurance claim against Mr. Cochran?

17 A. Per our insurance company, when we renewed it, we
18 weren't able to pursue it.

19 Q. Did they give you a specific reason?

20 A. Because there's new insurance, I believe -- or a
21 new policy, we weren't able to do it then.

22 Q. Okay. So would you say that you -- during the
23 period in question, that you used due diligence to hire
24 proper employees that could handle sales tax?

25 A. Yeah, absolutely. We thought we had great people

1 in there working. We had no idea.

2 MR. DOERR: No further questions.

3 JUDGE GEARY: Thank you.

4 Does respondent have any questions for this
5 witness?

6 MS. JACOBS: We do.

7 JUDGE GEARY: You may proceed.

8
9 CROSS-EXAMINATION

10 BY MS. JACOBS:

11 Q. Did -- was Ms. Perez's employment terminated or
12 did she leave on her own accord?

13 A. She left. She had a couple mental breakdowns and
14 left.

15
16 CROSS-EXAMINATION

17 BY MR. BACCHUS:

18 Q. Just a just couple more questions: Did you have
19 access to the CDTFA online system? Did you have your
20 own login information?

21 A. I don't think so at that time. I never did
22 anything. Logged in at that time, no.

23 Q. Okay. The reason I ask, our records indicate that
24 you, or your login information, was used to submit some
25 of the tax returns.

1 Would there have been another employee or someone
2 that would have used your login information, that you
3 are aware of?

4 A. I don't know. From what I understood, there was
5 just one login for the company, so whoever would be
6 doing that would log into whatever our log in is. I
7 have no idea.

8 Q. Okay. Thank you.

9 JUDGE GEARY: That's it for respondent?

10 Judge Aldrich, do you have any questions for this
11 witness?

12 JUDGE ALDRICH: Hello. Good afternoon. Thank you for
13 joining us.

14 Yes, I do have a couple questions.

15 So you indicated that Mr. Cochran was arrested by
16 the U.S. Marshals' office for fraud. What relation did
17 that fraud have with RVs 4 for less?

18 THE WITNESS: He had a prior fraud conviction or
19 issue. It wasn't due to us.

20 JUDGE ALDRICH: So it was entirely unrelated to the
21 issues that are at present?

22 THE WITNESS: Correct.

23 JUDGE ALDRICH: According to appellant's response
24 brief dated September 6th, 2022, the third quarter 2017
25 and fourth quarter 2017 weren't filed by Ms. Perez. Is

1 that your understanding as well?

2 THE WITNESS: I don't know. Let me see. When is it?

3 JUDGE ALDRICH: So the third quarter 2017 sales and
4 use tax return and the fourth quarter 2017.

5 THE WITNESS: Yeah. There was another gal that came
6 in to help her that was there temporarily for a couple
7 months.

8 JUDGE ALDRICH: Would that be Ms. Garcia?

9 THE WITNESS: Yeah.

10 JUDGE ALDRICH: What was RVs 4 Less' relationship with
11 Ms. Garcia?

12 THE WITNESS: She was an employee.

13 JUDGE ALDRICH: Okay. And why was she picked to file
14 the third quarter 2017 and fourth quarter 2017 returns?

15 THE WITNESS: Yeah. So when we hired her, she brought
16 in -- she had degrees, like multiple degrees; five,
17 six-plus degrees. She was certified in everything. And
18 she said that she knew how to do all that.

19 JUDGE ALDRICH: When you say "degrees," is that a
20 bachelor's in science? Is that in accounting?

21 THE WITNESS: She had accounting degrees and she had
22 other certifications. She had a lot of certifications
23 that she showed us. She had a whole binder of them.
24 And they were all laminated. She brought them in and
25 showed us all her certifications, so we thought we hit

1 the jackpot with her too.

2 JUDGE ALDRICH: But she was just on a temporary basis?

3 THE WITNESS: No. We hired her to help out with the
4 accounting, because she seemed to know more than Anna
5 did. And so -- but she didn't work out.

6 JUDGE ALDRICH: She didn't work out.

7 So you hired her -- for how long was she hired?
8 So it looks like she filed July 5th, 2018, and then at
9 some point she is dismissed or --

10 THE WITNESS: She quit.

11 JUDGE ALDRICH: And do you know about the time frame?
12 Was it a month? Three months? A year?

13 THE WITNESS: She was in our office for about
14 three months or so, maybe four months.

15 JUDGE ALDRICH: Okay. And so that would overlapped
16 with Mr. Cochran?

17 THE WITNESS: He would have came in after her.

18 JUDGE ALDRICH: Okay. Could you tell me a little bit
19 about -- well, first, are you familiar with RVs 4 Less'
20 record-keeping system with respect to the dealer
21 jackets?

22 THE WITNESS: Like how they are kept?

23 JUDGE ALDRICH: Yeah.

24 THE WITNESS: In files.

25 JUDGE ALDRICH: And is that on premises?

1 THE WITNESS: Yes.

2 JUDGE ALDRICH: And during the liability period did
3 you have an outside firm reviewing or preparing the
4 sales and use tax returns? It was all internal?

5 THE WITNESS: Yeah. Just whoever was in the
6 accounting position at our office.

7 JUDGE ALDRICH: Thank you. That's all of my
8 questions.

9 JUDGE GEARY: Thank you, Judge Aldrich.

10 Judge Stanley, do you have questions?

11 JUDGE STANLEY: I do not. Thank you.

12 JUDGE GEARY: I have a couple of questions for you.

13 When you hired -- when you hired any of these
14 individuals that you've mentioned, I take it you hired
15 them to be your primary bookkeeper?

16 THE WITNESS: Correct.

17 JUDGE GEARY: And describe what their -- their duties.
18 Just give me a summary of your bookkeeping duties that
19 you assigned to these various individuals.

20 THE WITNESS: So they handled day-to-day transactions.
21 They do payroll. They'd do all the sales transactions.
22 They enter in any withdrawals, anything with the bank
23 account. They handled everything.

24 JUDGE GEARY: Okay. I'm going to just go back through
25 that.

1 So sales transactions. Do they handle the
2 financing?

3 THE WITNESS: Financing of what?

4 JUDGE GEARY: On what you are selling.

5 THE WITNESS: No, they don't.

6 JUDGE GEARY: Somebody else does that?

7 THE WITNESS: Uh-huh.

8 JUDGE GEARY: So what would the bookkeeper's role be
9 in connection with just a sale of any particular unit?

10 THE WITNESS: What do they do as their responsibility?

11 JUDGE GEARY: For each sale.

12 THE WITNESS: Yeah. So they enter in, like, money
13 that's received for it. They enter in the contract
14 information. They enter in how much we were paid on it,
15 make sure the funds were received. And they record the
16 whole transaction on QuickBooks. And then they record
17 the sales tax.

18 JUDGE GEARY: And then they also handle the deposits?

19 THE WITNESS: Uh-huh. Everything.

20 JUDGE GEARY: So when you hired -- I think the first
21 person you mentioned was Daren, right?

22 THE WITNESS: Yeah.

23 JUDGE GEARY: You had hired him in 2016. I'm assuming
24 that Daren is a male?

25 THE WITNESS: He is.

1 JUDGE GEARY: Who was your bookkeeper before Daren?

2 THE WITNESS: I know Adela was there for quite some
3 time. She was there for about eight or nine years. She
4 was there a long time. I don't know if we had somebody
5 before him or if he came in right after Adela.

6 JUDGE GEARY: And Daren was there how long?

7 THE WITNESS: He was there about a year, year and a
8 half, maybe.

9 JUDGE GEARY: And you said he left to start his own
10 practice?

11 THE WITNESS: He did.

12 JUDGE GEARY: So when Daren came to work for you, what
13 did he tell you about his experience with sales and use
14 tax matters, if you can recall?

15 THE WITNESS: He was very skilled. I mean, everybody
16 tells us they are skilled. That's why we hired them,
17 right? Because they said they knew how to do the full
18 bookkeeping and do sales tax, the day-to-day
19 transactions, debits, credits, everything. So he would
20 have had that same qualification.

21 JUDGE GEARY: Did you ever check on anybody's
22 references in the bookkeeper position?

23 THE WITNESS: No, we don't.

24 JUDGE GEARY: You just believed them and took their
25 word for it?

1 THE WITNESS: We do.

2 JUDGE GEARY: Now I want to ask you about how sales
3 tax -- sales and use tax returns were actually prepared
4 by the company. Take me through that process from
5 beginning to end, describing what your bookkeeper's role
6 is and what role any other employees in the business
7 play in getting sales and use tax returns properly and
8 accurately completed.

9 THE WITNESS: I don't know how they can figure it,
10 because I have no involvement. They didn't share that
11 information, so I'm not sure how they came with
12 submitting their records to the system. I have no idea.
13 They didn't share that.

14 JUDGE GEARY: Did your father?

15 THE WITNESS: No, no. He is not computer-savvy at
16 all.

17 JUDGE GEARY: So during this period that is the
18 subject of this audit, '16, '17 and '18, essentially,
19 were all returns filed electronically during that
20 period? Do you know?

21 THE WITNESS: I don't know. I don't know how they
22 were filed.

23 JUDGE GEARY: Do you recall ever signing any sales and
24 use tax return?

25 THE WITNESS: I don't.

1 JUDGE GEARY: And I think you indicated earlier you
2 didn't recall ever registering for the company's online
3 access to CDTFA's system?

4 THE WITNESS: Yeah. I just assumed that it would be
5 one login for the business. I'm guessing.

6 JUDGE GEARY: But you weren't involved in that process
7 of creating that login?

8 THE WITNESS: No. Not that I recall, no.

9 JUDGE GEARY: And do you recall ever using that login?

10 THE WITNESS: I don't. I don't recall.

11 JUDGE GEARY: You don't recall. Okay.

12 Have you talked with your father about whether he
13 ever used the CDTFA login for the purpose of either
14 filing a return or making a payment?

15 THE WITNESS: I know he would not be able to figure
16 out how to log in on there. He is not computer-savvy at
17 all. He has trouble doing his emails.

18 JUDGE GEARY: Do you recall any of your bookkeepers
19 ever coming to you and showing you a sales and use tax
20 return worksheet to explain to you what they planned to
21 report?

22 THE WITNESS: I don't recall that, no.

23 JUDGE GEARY: Would it be fair to say that the
24 bookkeepers were pretty much on their own for collecting
25 the data, recording the data and reporting the data?

1 THE WITNESS: Correct.

2 JUDGE GEARY: And neither you nor father was involved
3 in the process at all?

4 THE WITNESS: No. We didn't handle any of that.

5 JUDGE GEARY: Was there any other employee with
6 accounting background besides the bookkeeper during this
7 period?

8 THE WITNESS: No.

9 JUDGE GEARY: Now, I want to ask you a little bit
10 about John. Is it Cochran?

11 THE WITNESS: It is.

12 JUDGE GEARY: You said the Marshals came. Marshals
13 typically are out arresting people on fugitive warrants.
14 Did they have a fugitive warrant for him?

15 THE WITNESS: They couldn't explain much information
16 on why they were arresting him or what they were
17 arresting him for. They said he wouldn't be back for a
18 long time. That's what they said.

19 JUDGE GEARY: Okay. So I think you said in response
20 to Judge Aldrich's question that your understanding is
21 that whatever they took him away for had to do with
22 something that happened outside of your company.

23 THE WITNESS: Yes, correct.

24 JUDGE GEARY: And then you indicated that you
25 discovered there were problems within your own company's

1 finances and employees' finances that you attribute to
2 Mr. Cochran.

3 THE WITNESS: Correct.

4 JUDGE GEARY: Why do you attribute these problems to
5 Mr. Cochran?

6 THE WITNESS: He had a personal laptop that we know
7 was stolen by his son -- or in his household. And he
8 admitted that he had a lot of information on there of
9 the employees, because he used to log in to the
10 QuickBooks system on his laptop.

11 JUDGE GEARY: He was authorized to do that, though,
12 right?

13 THE WITNESS: He wasn't authorized to work at home and
14 have all that system on there, no. We didn't know. We
15 had an online system where he could do that, I guess.
16 And so we found out later that's what happened. And his
17 son was arrested as well.

18 JUDGE GEARY: Did you provide Mr. Cochran with a
19 computer to use -- or give him access to a computer
20 terminal at work?

21 THE WITNESS: Just at work, yes.

22 JUDGE GEARY: And you expected him to log on to
23 whatever systems belonged to your company on the work
24 computer only?

25 THE WITNESS: Right.

1 JUDGE GEARY: And you are saying that he actually was
2 doing on his private computer at home?

3 THE WITNESS: Right.

4 JUDGE GEARY: All right. You said you filed a police
5 report, correct?

6 THE WITNESS: We did.

7 JUDGE GEARY: And has that police report been provided
8 to OTA, do you know? I don't see it in the evidence.

9 MR. DOERR: If you look at Exhibit 5, there is kind of
10 a cover sheet which the Clovis Police Department gives.
11 I mean, it's very difficult to see.

12 JUDGE GEARY: There's nothing in there. Does it say
13 -- can you read what the complaint was or who the
14 complainant was, or what the wrongdoing was alleged or
15 --

16 MR. DOERR: It says who the officer is. It's got some
17 numbers on it, but it doesn't have much more than that.
18 I don't believe it has that information in that what
19 they gave her.

20 THE WITNESS: Yeah. I saw that. I thought I saw
21 something else in here.

22 JUDGE GEARY: Have you ever seen the complete police
23 report that recites identifications and names of
24 witnesses and indicates what you told the investigating
25 officer Mr. Cochran did or failed to do?

1 THE WITNESS: No. We actually went in there because
2 we were also having, like, ransom -- people were calling
3 us demanding money.

4 JUDGE GEARY: Did you say "ransom"?

5 THE WITNESS: Yeah. They were demanding money while
6 John was working there, yeah. Towards the end there, it
7 got really hairy. But, yeah, they were demanding us to
8 give them large amounts of money, which we found out was
9 through his son. So it was a whole mess.

10 JUDGE GEARY: But when you say "ransom," were they
11 holding your database, locking it up or somehow
12 preventing you access to --

13 THE WITNESS: No. They told us that they had access
14 to all of our information, bank accounts and stuff like
15 that.

16 JUDGE GEARY: They were trying to extort money from
17 you and using their apparent control of your system?

18 THE WITNESS: Right.

19 JUDGE GEARY: Those are all the questions I have.
20 Thank you. I want to make sure no one else has any
21 questions now.

22 Respondent, any further questions from you?

23 MS. JACOBS: We do have a few more questions.

24 JUDGE GEARY: All right. Proceed.

25 ///

1 CROSS-EXAMINATION

2 BY MS. JACOBS:

3 Q. Was Ms. Perez an employee of RVs 4 Less?

4 A. Yes.

5 Q. Was Mr. Cochran an employees of RVs 4 Less?

6 A. Yes.

7 Q. And did you have any concern with Ms. Perez's
8 competency relating to filing the sales and used tax
9 returns given her mental health issues?

10 A. Not competency on filing it. I felt like she
11 still could do her work. She just had breakdowns, a few
12 breakdowns.

13 MS. JACOBS: Thank you.

14 JUDGE GEARY: Judge Aldrich, do you have any other
15 questions?

16 JUDGE ALDRICH: I do have a couple follow-up
17 questions. Thank you.

18 So during the liability period how many bank
19 accounts did RVs 4 Less have? Was there one central?
20 Multiple?

21 THE WITNESS: Yeah, we would have one main bank
22 account. We had an old bank account, but money wasn't
23 going through there, but it was still open.

24 JUDGE ALDRICH: Okay. And during that time who had
25 check-signing authority for the bank account?

1 THE WITNESS: It would be myself and my dad.

2 JUDGE ALDRICH: Okay. And so after a sales and use
3 tax return was prepared, there would be presumably an
4 amount of money in taxes that needed to be paid. Can
5 you walk me through that process, how that's resolved?

6 THE WITNESS: Whoever was filing the tax return would
7 have paid it. Is that what you are referring to?

8 JUDGE ALDRICH: So --

9 THE WITNESS: Because they had control of the bank
10 account, so they saw what was in the bank account. They
11 controlled what was going out. They just gave us checks
12 to pay, like accounting. Is that what you are referring
13 to?

14 MR. DOERR: Did you actually sign -- who actually
15 signed the check?

16 THE WITNESS: No. We never signed a check to pay
17 sales tax.

18 MR. DOERR: How did they get paid?

19 THE WITNESS: They would have done it online, yeah.

20 JUDGE ALDRICH: So only you and your father have
21 check-signing authority, but somebody else is submitting
22 the payment?

23 THE WITNESS: Yeah. Whoever was in the accounting
24 position.

25 JUDGE ALDRICH: But --

1 MR. DOERR: So they had -- other people, they couldn't
2 sign checks, but they were authorized to go inside the
3 bank account and authorize payments out of there?

4 THE WITNESS: Well, they filed the tax returns and
5 paid it online.

6 MR. DOERR: How do you pay it online if it wasn't for
7 you and your dad? Like, did they have --

8 THE WITNESS: They didn't have to have our signature
9 to do that.

10 JUDGE GEARY: They could go into your bank account and
11 do the online bill pay or something?

12 THE WITNESS: They went into the system to log in for
13 the sales tax, and then they paid it through the sales
14 tax system.

15 MR. DOERR: How did they get from the bank account to
16 -- like, there has to be some link with --

17 THE WITNESS: The sales tax would just be debited from
18 our bank.

19 JUDGE ALDRICH: So in setting up the account, was
20 there some sort of bank routing number, perhaps?

21 THE WITNESS: Yeah. They would have our routing
22 number and account number to pay. It's just debited
23 from our bank.

24 JUDGE ALDRICH: Okay. So if I'm understanding
25 correctly, there were three different bookkeepers: Ms.

1 Perez, Ms. Garcia and Mr. Cochran, right? And you
2 indicated that you don't reference-check?

3 THE WITNESS: No. Don't do background check or
4 reference check.

5 JUDGE ALDRICH: But you also indicated that nobody
6 really oversees the bookkeepers? Nobody checks in on
7 what they're doing?

8 THE WITNESS: I mean, we would ask them how things are
9 going, but none of us are skilled enough to oversee
10 them. We just trust what they are telling us on how
11 they are doing with everything.

12 JUDGE ALDRICH: Okay. All right. Thank you.

13 JUDGE GEARY: Judge Stanley, do you have questions?

14 JUDGE STANLEY: I did, but they have all now been
15 answered. Thank you.

16 JUDGE GEARY: Okay. I think we're through with the
17 witnesses now, correct? All right.

18 You are ready to give your argument? You can pull
19 that microphone right in front of you and you can begin
20 when you are ready. It's 1:50 p.m., 1:51.

21 MR. DOERR: As we heard from the testimony today,
22 especially from Mr. Smith, that appellant's sales tax
23 returns were incredibly complicated.

24 As we heard from Ms. Sullins, it was her and her
25 dad: Mr. Kuehne, being the sole shareholder of RVs 4

1 Less, and his daughter, Ms. Sullins, who oversaw the
2 entire operation; however, their skills were strictly
3 sales, sales of RVs. That's what they were good at.

4 They employed various bookkeepers and other staff
5 members to take care of not only the sales tax, but
6 payroll and all the accounting. And given the
7 complexity of it, overseeing that operation was -- would
8 be difficult. I mean, they can see that the job was
9 done. And when it wasn't done, when Mr. Cochran in
10 October of '18, when it was discovered or -- October of
11 '19, it was discovered that the bank account was levied
12 was the first time that they had any indication that
13 during the tax period of '16 to '18, there was anything
14 wrong with the sales tax reporting.

15 I mean, CDTFA, you know, contends that because of
16 the past errors -- this was the period from '12 to '14,
17 that they were put on notice. And, you know, after the
18 period they did, you know, seemingly hire competent
19 people. They did have one very competent person.
20 Unfortunately, he decided to open up his own shop. And
21 from there, they went through a series of three
22 different people. And it was during that time that the
23 deficiencies -- the errors were made. And there was
24 some timing -- if you look at all the quarters of the
25 tax period, it wasn't until the fourth quarter of '17.

1 So at the very end of the period, all the
2 liability is, I believe, over \$4 million of unreported
3 sales. Before that, it was -- I think it was -- if we
4 go to Exhibit 1, it was close to 56,000, so just a small
5 fraction. And that was only in one quarter, which is
6 the third quarter of 2017.

7 So in the past errors, they did attempt to correct
8 that situation. The limited records argument that the
9 CDTFA also bring, again, due to the employees that were
10 hired to handle, this taxpayer through the principal
11 shareholder and his daughter, they didn't know what sort
12 of records needed to be kept. If they knew how to do
13 that, they'd probably do it themselves. But, again,
14 they had to hire out.

15 And CDTFA does talk in their briefing materials
16 how there was liability in all quarters, but it doesn't
17 seem, from Exhibit A -- or from Exhibit 1, that doesn't
18 seem to be the case. And that lines up with the trouble
19 they had with Ms. Perez and Mr. Cochran, with Ms. Garcia
20 mixed in there for a couple of months.

21 JUDGE GEARY: All right. Thank you. Four minutes --
22 or three minutes.

23 Respondent ready to give its argument?

24 MS. JACOBS: We are. Thank you.

25 JUDGE GEARY: You may proceed.

1 PRESENTATION

2 MS. JACOBS: The sole issue in this appeal is whether
3 appellant is entitled to relief at the 10 percent
4 negligence penalty for the period of January 1st, 2016,
5 through December 31st, 2018.

6 As you are aware, Revenue and Taxation Code
7 Section 6484 provides for the imposition of a 10 percent
8 penalty if any part of a deficiency determination was
9 made due to negligence or intentional disregard of the
10 law or authorized rules and regulations.

11 "Negligence" is generally defined as the failure
12 to exercise such care that a reasonable and prudent
13 person would exercise under similar circumstances.

14 Warner versus Santa Catalina Island Company; 1955,
15 44 Cal.2d 310, page 317. See also People versus
16 Superior Court 2016, 248 Cal.App.4th 434, page 447. And
17 also the CDTFA Audit Manual, section 0506.10.

18 In Independent Iron Works Incorporated versus
19 State Board of Equalization; 1959, 167 Cal.App.2d 318,
20 page 323, the Court held that a negligence penalty is
21 justified where errors are continued from one audit to
22 the next.

23 Taxpayers are required to maintain and make
24 available for examination on request by the department
25 all records necessary to verify the accuracy of any

1 return filed; or if no return has been filed, to
2 ascertain and determine the amount required to be paid,
3 sections 7053 and 7054 and Regulation 1698(b)(1). Such
4 records include but are not limited to the normal books
5 of account ordinarily maintained by the average, prudent
6 business person engaged in the activity in question;
7 bills, receipts, invoices, cash register tapes and other
8 documents of original entry, and schedules or working
9 papers used in connection with the preparation of the
10 tax returns. Regulation 1698(b)(1).

11 Failure to maintain and provide complete and
12 accurate records will be considered evidence of
13 negligence. Regulation 1698(k). And a negligence
14 penalty may also be based on failure to properly prepare
15 returns. Audit Manual 0508.10.

16 In this case, appellant's records weren't adequate
17 for sales and use tax purposes. This was appellant's
18 second audit. And while some records were provided,
19 appellant wasn't able to explain to staff how they
20 prepared their returns and did not provide sales and use
21 tax return worksheets for review. Exhibit C, pages 54
22 and 123. All page numbers are to pages within the
23 hearing binder.

24 Because appellant's underreporting was so
25 significant, the department determined that appellant

1 did not exercise due care in keeping its records. See
2 Audit Manual 0507.35.

3 Appellant's failure to maintain and provide
4 adequate books and records is evidence of negligence.
5 Regulation 1698(k). But appellant also significantly
6 underreported taxable sales throughout the liability
7 period, with underreported taxable sales of over \$4
8 million, representing an error ratio of approximately
9 31.5 percent when compared with reported taxable sales.

10 The significant error ratio and substantial
11 understatement amount are evidence of negligence. See
12 Exhibit A, page 35; Exhibit C, pages 53 and 327.

13 Moreover, appellant was previously audited for the
14 period of January 1st, 2012, through December 31st,
15 2014, in which appellant was informed that it needed to
16 improve its reporting. However, between the prior audit
17 and the audit at issue, appellant repeated the same or
18 similar errors, and its percentage of error actually
19 increased from approximately one quarter to one-third,
20 or 25 percent to around 31 percent.

21 JUDGE STANLEY: Ms. Jacobs, you sped up just now.

22 MS. JACOBS: Oh, sorry.

23 Exhibit A, pages 35 to 36. And Exhibit C, page
24 123.

25 Appellant's errors continuing from one audit to

1 the next is evidence of negligence. See independent
2 Iron Works, Incorporated, versus State Board of
3 Equalization, which I've already cited.

4 In this instance, appellant failed to exercise the
5 due care that a reasonable and prudent business person
6 would exercise under similar circumstances, and was
7 therefore negligent.

8 Appellant contends that its recording errors were
9 due to its employee, Anna Perez, who appellant states
10 was hired nearly two years into the liability period at
11 issue, on or about November 15th, 2017, and who
12 apparently left the corporation within a year of being
13 hired.

14 We first note that appellant has not shown or
15 provided documentary evidence that Ms. Perez was the
16 individual who was tasked with filing the returns on
17 behalf of appellant. Appellant has also described some
18 of Ms. Perez's personal struggles during her time of
19 employment; however, regardless of these, appellant made
20 similar reporting errors in its prior audit and before
21 Ms. Perez's employment in third quarter 2017.

22 Furthermore, appellant claims that it hired Ms.
23 Perez to prepare reported sales and use tax returns. As
24 such, Ms. Perez was an agent of appellant. See Civil
25 Code Sections 2295 and 2299.

1 It is well established that an employer is
2 responsible for the acts of its agent in the scope of
3 their employment, even if the acts are made without the
4 employer's knowledge or consent and even when the acts
5 are detrimental to the employer's interests. Civil Code
6 Section 2338 and case *Lisa M. Versus Henry Mayo Newhall*
7 *Memorial Hospital*, 1995, 12 Cal.4th 291, page 296. And
8 also Audit Manual 0506.20.

9 Thus, the negligence penalty may still apply, even
10 if negligence occurred due to an employee's -- in this
11 case Ms. Perez's -- actions or inaction with respect to
12 filing appellant's sales and use tax returns.

13 Furthermore, appellant's purported reliance on
14 Ms. Perez's accounting experience did not obviate
15 appellant's responsibility as the taxpayer to accurately
16 report and pay its sales and use tax liability, nor do
17 we consider that reliance reasonable.

18 Appellant's former employee, John Cochran, was
19 hired after Ms. Perez on July 25th, 2018, or
20 thereabouts. Again, appellant states it hired
21 Mr. Cochran to prepare reported sales and use tax
22 returns. And as such, Mr. Cochran was also an agent of
23 appellant. See Civil Code Sections 2295 and 2299.

24 Appellant claims that Mr. Cochran committed fraud
25 against the corporation, and has provided documents

1 related -- or I guess not against the corporation -- or
2 maybe. I don't know. They provided documents related
3 to his alleged misconduct. However, neither Exhibit 4
4 or 5 constitute actual evidence that appellant had
5 suffered at the hands of Mr. Cochran, nor has appellant
6 provided documentary evidence that Mr. Cochran was
7 committed -- or was convicted of any criminal charges,
8 or a satisfactory explanation of how these criminal
9 activities impacted appellant's ability to accurately
10 report its sales and use tax.

11 Regardless, according to Civil Code section 2338,
12 appellant is responsible for the negligence of
13 Mr. Cochran in the scope of his employment, including
14 wrongful acts committed by him and willful omission to
15 fulfill appellant's obligations.

16 In the case that I already cited, Lisa M. Versus
17 Henry Mayo Newhall Memorial Hospital, the California
18 Supreme Court held, quote, "An employer is vicariously
19 liable for the torts of its employees committed within
20 the scope of the employment." End quote. And that an
21 employee's actions need not benefit the employer to be
22 considered within the scope of employment. See 12
23 Cal.4th, 291, page 296.

24 And I'll pause for a drink of water.

25 Finally, significant underreporting began before

1 Mr. Cochran was hired in July 2018, and continued
2 through Mr. Cochran's tenure.

3 Since appellant had underreporting issues in its
4 prior audit, and Ms. Perez's employment ended apparently
5 due to issues related to competency, appellant's
6 complete reliance on Mr. Cochran to properly report its
7 sales and use tax liabilities was unreasonable, and
8 appellant did not exercise care that a reasonable and
9 prudent person would exercise under similar
10 circumstances.

11 In sum, appellant has not established that the
12 understatement can be attributed to a good faith and
13 reasonable belief that its bookkeeping and reporting
14 practices were substantially compliant with the
15 requirements of the sales and use tax law.

16 For these reasons, we request the appeal be
17 denied. Thank you.

18 JUDGE GEARY: Thank you.

19 Judge Aldrich. Do you have any questions for
20 CDTFA?

21 JUDGE ALDRICH: Yes, I do.

22 So the department's position is that the prior
23 audit period and the current liability period, there are
24 similarities between the two in the understatement. In
25 what ways, if any, are they similar, the two audit

1 periods?

2 MR. PARKER: So in the prior audit, the differences
3 were basically recorded taxable sales versus reported
4 taxable sales, which is the same types of errors when we
5 added up all the recorded taxable sales based on the
6 transactions that they had in the current audit period.
7 We compare that to the reported taxable sales. So it's
8 recorded versus reported taxable sales difference in
9 each audit.

10 JUDGE ALDRICH: Thank you.

11 And a follow-up question: In the prior audit
12 period, was there a spike or a constant amount that was
13 being underreported? And then, comparatively, was it
14 relatively constant in this liability period or is there
15 a spike in the amount of underreporting?

16 MR. PARKER: In the prior audit period there were
17 differences in most of the quarters. I realize the
18 prior audit is not in the evidence here -- evidentiary
19 record, but the differences -- there were differences in
20 pretty much all of the quarters of -- there was
21 1.3 million in difference in the prior audit, and about
22 600,000 of that was from one quarter. But most of the
23 other quarters had at least \$100,000 in difference.

24 JUDGE ALDRICH: CDTFA's position with respect to the
25 liability period at issue, could you address whether or

1 not it was a constant underreporting or a spike?

2 MR. PARKER: In the current audit, obviously, they
3 talked about the timing differences that we allowed in
4 the -- so there were differences in all the quarters;
5 however, the first seven quarters -- or six quarters
6 pretty much offset.

7 We gave them the benefit of the doubt for the
8 credit periods to offset against the liability periods.
9 So even though there were differences in all those
10 periods, we attributed it to timing. And so all of the
11 differences in the current audit are in the last
12 six quarters; mainly the last five. The third quarter
13 of '17 is, I think, around 45,000 out of the 4.2
14 million.

15 JUDGE ALDRICH: Thank you.

16 So the department also indicated that the lack of
17 records was a basis for evidence of negligence. Which
18 records specifically?

19 MS. JACOBS: Well, as it's stated in the audit report
20 letter, like, they were not able to explain -- they did
21 not have records of how the sales and use tax returns
22 were prepared. So we would be looking for, like,
23 worksheets specifically relating to how she translated
24 any records they did have into the sales and use tax
25 records.

1 JUDGE ALDRICH: And a follow-up question, but for
2 appellant's relative.

3 Was CDTFA's representation of the spike in the
4 current liability consistent with your position or
5 understanding?

6 MR. DOERR: Yes. Going back to Exhibit 1, you can see
7 that they said accurately that the third quarter of '17
8 was the first understatement. And that was -- I have
9 59,000. He said a different number, but it was pretty
10 close to that -- out of a total of over 4 million. So,
11 yes, it's the last five quarters where you see the major
12 spikes, especially the last quarter of '18 and the first
13 -- I believe it's -- the second quarter of '18, which
14 would correspond to Mr. Cochran's employ.

15 JUDGE ALDRICH: Thank you. No further questions from
16 me.

17 JUDGE GEARY: Thank you.

18 Judge Stanley, any questions?

19 JUDGE STANLEY: Yes.

20 Because we can't accept your -- what you are
21 saying about the prior audit as evidence, because we can
22 only go based off of our record, is there anything
23 within this audit or the decision other than -- I saw
24 one phrase that I think just said there were similar
25 concerns in the prior audit or similar mistakes in the

1 prior audit. Do you have anything that would -- within
2 the record that would show us that?

3 MS. JACOBS: So I believe on -- in Exhibit A, in page
4 35. And then Exhibit C, pages 53 and 327, Exhibit C
5 being the current audit work papers, there are
6 references to the prior audit within the current audit
7 work papers.

8 JUDGE STANLEY: And I just want to be clear that it's
9 the department's position that a reasonable, prudent
10 business person or business owner would not -- who
11 didn't know anything about taxes would hire an expert.

12 So you are saying that based on the agency rules,
13 it just -- it's attributed to them anyway?

14 MS. JACOBS: Well, in this case, as we heard today,
15 appellant hired two individuals without checking
16 references, and then also gave them complete control of
17 their financials without any oversight. We would
18 consider that to be negligence, as well as being --
19 because they were employees versus like an outside firm,
20 they are also agents of appellant, and therefore, their
21 actions are attributed to appellant.

22 JUDGE STANLEY: Okay. Thank you.

23 JUDGE GEARY: Thank you, Judge Stanley.

24 Mr. Doerr, I can -- if you'd like to take a few
25 minutes to make some concluding remarks, I'd be happy to

1 allow you to do so.

2 MR. DOERR: Okay. What we heard from the CDTFA right
3 now, that even though it's not part of the record, in
4 the first audit period, '12 to '14, it was kind of amore
5 consistent underreporting situation that would indicate,
6 perhaps, that there was more of a systematic problem.

7 However, if you look at the current audit period,
8 you have -- I mean, as they said, six quarters of which
9 there was only timing differences, which, you know, we
10 explain how that could happen.

11 It wasn't until you got to the third quarter of
12 '17, which you have a small \$59,000 discrepancy. Then
13 it creeps up to 700,000. And then -- which corresponds
14 to the trouble we had with employees. I mean, it is
15 difficult to find qualified, competent people in Fresno
16 to do the sales tax reporting.

17 And appellant did the best they could. With their
18 knowledge base on tax and accounting and their skill
19 set, they relied on people that came with resumes that
20 looked really good and experienced. And for many
21 quarters that was fine. It just happened to be we had
22 two pretty poor employees. And I wouldn't say Ms. Perez
23 was a poor employee per se, because she was going
24 through a very difficult time, as they indicated in the
25 email that -- I believe it's Exhibit 3.

1 Mr. Cochran, on the other hand, was a bad person
2 who, we believe, has deceived other people, as he was
3 arrested, we indicated. Not for any issue at RVs 4
4 Less, but for some employment. So he was a pretty good
5 manipulator of people and he was able to get into our
6 system and, gain, trust and commit some, you know,
7 pretty awful things against appellant.

8 So I mean, I would say given the complexity of the
9 sales tax and the skill set of the taxpayer, I think
10 they were reasonable in their reliance on professionals
11 that told us that they were competent in the job.

12 And there was no indication during that time that
13 there was a problem, which happens in these audits. You
14 find out later, outside of the tax period. During the
15 tax period we didn't know that anything was going on.
16 In fact, Danielle testified that she was not aware of
17 any issue until the bank account was levied; and that
18 was late October of 2019. And in the beginning of
19 December, less than two months later, Mr. Cochran is
20 arrested at the place of business. And from there, they
21 -- you know, they're trying to find skilled people to
22 fulfill that role.

23 I would think that they exercised reasonable care.
24 I'm not sure what taxpayers are supposed to do in this
25 situation. If she was an expert she would do it

1 herself. They much rather do themselves, but they have
2 to rely on others. And, again, I can't stress more the
3 complexity of this type of sales tax compared to others.
4 That's all.

5 JUDGE GEARY: Thank you, Mr. Doerr.

6 Mr. Doerr, does appellant submit the matter?

7 MR. DOERR: Yes.

8 JUDGE GEARY: And Ms. Jacobs?

9 MS. JACOBS: Yes. Thank you.

10 JUDGE GEARY: All right. Thank you. The case is
11 submitted on October 18th, 2023, at 2:15 p.m. the
12 record is now closed. Thank you, everyone, for
13 participating. In the coming weeks the panel will be
14 meeting to discuss the matter and OTA will issue its
15 opinion within 100 days of today's date.

16 This hearing is now concluded. And the hearing
17 calendar for OTA for today is also now concluded.
18 Thanks, everybody.

19 (Proceedings concluded at 2:15 p.m.)
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REPORTER'S CERTIFICATE

I, CYNTHIA P. HERNANDEZ, CSR NO. 13521, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were taken before me
at the time and place therein set forth.

That the testimony of the witness, the questions
propounded, and all objections and statements made were
recorded stenographically by me and were thereafter
transcribed;

That the foregoing is a true and correct transcript
of my shorthand notes so taken.

I further certify that I am not a relative or
employee of any of the parties, nor financially
interested in the action.

I declare under penalty of perjury under the laws of
California that the foregoing is true and correct.

Dated this 10th day of November, 2023.



CYNTHIA P. HERNANDEZ, CSR NO. 13521

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